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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 96

CANTON RAILROAD COMPANY,

Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHENS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

STATEMENT AS TO JURISDICTION

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IN THE COURT OF APPEALS OF MARYLAND

CANTON RAILROAD COMPANY,
Appellant,

vs.

JOSEPH H. A. ROGAN, OWEN E. HITCHENS AND WILLIAM W. TRAVERS, CONSTITUTING THE STATE TAX COMMISSION OF MARYLAND.

JURISDICTIONAL STATEMENT

The Appellant, Canton Railroad Company, in support of the jurisdiction of the Supreme Court of the United States to review, upon appeal, the final decree of the Court of Appeals of Maryland filed April 19, 1950, in this case, respectfully shows:

A

Statutory Provision Sustaining Jurisdiction

The statutory provision which sustains the jurisdiction of the Supreme Court of the United States of this appeal is U. S. C. Title 28, Section 1257, and in particular paragraph (2) thereof, which, to the extent relevant, is as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being

repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The above statutory provision is applicable to this appeal, because in this case there was drawn in question the validity of a statute of the State of Maryland (namely, Annotated Code of Maryland (1943 Supp.) Article 81, Sections 94½ and 95 set out below), on the ground of its being repugnant to Article 1, Section 10, Clause 2 (Import-Export Clause) of the Constitution of the United States, and the decision and final decree in this case rendered by the Court of Appeals of Maryland (two judges dissenting), which is the highest Court of Maryland in which a decision could be had, was in favor of the validity of said statute.

B

Statute of the State of Maryland the Validity of Which Is Involved

The statute of the State of Maryland, the validity of which was drawn in question as being repugnant to Article 1, Section 10, Clause 2 (Import-Export Clause) of the Constitution of the United States, and sustained by the decision and decree of the Court of Appeals of Maryland in this case, is Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) and may be found at pages 862 and 863 of that volume, which is the official edition of the statutes of the State of Maryland. Article 81, Section 94½ of the Annotated Code of Maryland (1943 Supp.) is a codification of Laws of Maryland 1943, Chapter 488, Section 12, page 588, and Article 81, Section 95 of the Annotated Code of Maryland (1943 Supp.) is a codification of Laws of Maryland 1922, Chapter 351, Section 1, pages 784 and 785, and Laws of Maryland 1941, Chapter 906, Section 6, page 1654.

Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) reads, to the extent relevant, as follows:

"94½. The phrases 'gross receipts', 'total receipts', 'gross earnings', 'total earnings' and 'all earnings', as used in Sections 95 to 100, inclusive, mean in the case of railroads and other public service corporations, the operating revenues thereof, without any deductions or credits of any kind whatsoever. When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or classes of business. This section shall not be construed as implying that in the absence of this section the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed.

"95. (a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

"(1) All domestic or foreign railroad companies whose roads are worked by steam, doing business in this State, at the following rates, to wit:

"One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

"Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

"Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * * *

"(b) If any such railroad company has part of its road in this State and part thereof in another State or States, such company shall return a statement of its

gross receipts over its whole line of road, together with a statement of the whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

"(c) Every partnership or individual engaged in any of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

C

The Interpretations of the Statute Involved

The above-quoted statute of the State of Maryland has been construed by the Court of Appeals of Maryland, in this case and former cases, to lay and impose upon railroad companies operating in Maryland, not a property tax upon their operating properties or upon their gross receipts, but a franchise or privilege tax upon their privileges to engage in the business of operating a railroad, including their privileges of engaging in foreign commerce and in the importing and exporting process (*i.e.*, handling, transporting and forwarding imports and exports in transit). (See opinion of the Court of Appeals in this case, appended

hereto, and *State* v. *Philadelphia, Wilmington and Baltimore Railroad Company*, 45 Md. 361 (1876), *State* v. *Baltimore and Ohio Railroad Company*, 48 Md. 49 (1878) and *Cumberland and Pennsylvania Railroad Company* v. *State*, 92 Md. 668 (1901).

The tax is expressly laid and imposed upon individuals and partnerships engaged in the railroad business as well as upon railroad corporations, and has been construed in this case by the Court of Appeals of Maryland, not to lay or impose a franchise or privilege tax upon such railroad corporations' corporate franchises, or privileges to operate as bodies corporate in the corporate form, but upon their privileges to operate a railroad.

That portion of the over-all tax which is laid and imposed solely upon a railroad company's privilege to engage in intra-state commerce is separable from the rest of the over-all tax and is measured by its gross receipts derived from its intra-state railroad business alone; that portion of the over-all tax which is laid and imposed solely upon a railroad company's privilege to engage in foreign commerce and in the importing and exporting process (*i.e.*, handling, transporting and forwarding imports and exports in transit) is separable from the rest of the over-all tax and is measured by its gross receipts derived from its operations in foreign commerce and in the importing and exporting process alone. This interpretation follows from the statutory provision in Section 95 of Article 81 of the Annotated Code of Maryland (1943 Supp.) that the gross receipts measure the amount of the privilege taxes; from the second sentence of Section 94½ of Article 81 of the Annotated Code of Maryland (1943 Supp.), applying portions of the over-all gross receipts tax to each "class of business" engaged in by the taxpayer and requiring the gross receipts from each class of business engaged in, when taxed at a

different rate or not taxed at all, to be "reported separately"; and also follows from the decision in *State* v. *Baltimore and Ohio Railroad Company*, 48 Md. 49 (1878), which segregated, for purposes of the imposition of the franchise or privilege tax, the gross receipts of the Baltimore and Ohio Railroad Company derived from the different operations of that company. In other words, the tax is not laid merely upon a railroad company's privilege of engaging in intra-state commerce alone, measured by the gross receipts derived from all of its business, including its operations in foreign commerce and in the importing and exporting process.

D

The Final Decree of the Court of Appeals of Maryland Sought to Be Reviewed and the Application for Appeal Therefrom.

The final decree of the Court of Appeals of Maryland in this case, which is sought to be reviewed by this appeal, was entered by that court April 19, 1950. The words at the foot of the opinion of the Court of Appeals filed April 19, 1950, (appended hereto), reading "Decree affirmed, with costs", constitutes the final decree of that court and is made such by a rule of the Court of Appeals of Maryland dated December 6, 1949. No motion for reargument was filed in this case and, under the rules of the Court of Appeals of Maryland, the date upon which the time permitted for filing such motion for reargument expired May 19, 1950, on which date the mandate of the Court of Appeals of Maryland issued to the lower court, the Circuit Court No. 2 of Baltimore City. See *Market Street R. Co.* v. *Commission*, 324 U. S. 542, 548.

The appeal to the Supreme Court of the United States in this case was applied for by a Petition for the Allowance

of Appeal presented to the Chief Judge of the Court of Appeals of Maryland on May 24, 1950, and said appeal was allowed by order of the Chief Judge of the Court of Appeals of Maryland dated May 24, 1950.

U. S. C. Title 28, Section 2101(c) provides a period of ninety days after the entry of the decree appealed from in which the appeal may be taken.

E

The Nature of the Case and the Rulings of the Court of Appeals of Maryland and Lower Tribunals

Canton Railroad Company is a Maryland corporation engaged, as a common carrier of freight only, in operating a switching railroad, the lines of which lie wholly within Baltimore City and Baltimore County in the State of Maryland. It operates a marine terminal in the port of Baltimore, and its lines run from said marine terminal and connect with the trunk line railroad carriers serving the port of Baltimore. Its business of handling, transporting and forwarding freight in transit falls into three classes, namely, (1) intra-state commerce, (2) interstate commerce, and (3) foreign commerce and the importing and exporting process.

The last-mentioned class of its business consists of receiving from vessels which dock at its marine terminal, imports, such as ores, wood pulp and sugar, originally consigned from foreign countries to points in inland United States and, while they are in continuous transit and in their unbroken original packages, Canton Railroad Company, as the agent of the original consignors or the importer consignees of the goods, handles these imports at once at its piers (*i.e.*, weighs them, furnishes crane and wharf privileges and brief temporary storage), and trans-

ports them without delay to the points in Baltimore where its lines connect with the trunk line railroads, to which it delivers them to be carried to their ultimate destinations. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652 (1945). Canton Railroad Company also, as the agent of the original consignors of the goods, receives exports from these connecting carriers, which have been originally consigned from inland points in the United States to foreign countries and, as the connecting link in their over-all transit, transports them to its marine terminal, where these exports are loaded without delay upon vessels bound for their foreign destinations. See *Coe* v. *Errol*, 116 U. S. 517 (1886). Thus, in performing these importing and exporting services, Canton Railroad Company performs a necessary and indispensable component part of the importing and exporting process.

Canton Railroad Company is subject to and pays an annual state franchise tax "for its franchise to be a corporation", imposed by Article 81, Section 144 of the Annotated Code of Maryland (1947 Supp.). It also is subject to an annual State income tax upon net income over and above its railroad operating revenues less related expenses, imposed by Article 81, Sections 230, 223(m) of the Maryland Code (1947 Supp.). It also is subject to and pays substantial annual local ad valorem property taxes upon its operating properties to Baltimore County and Baltimore City, imposed by Article 81, Sections 6(5) and 13 of the Maryland Code (1947 Supp.). Its operating properties are exempted, by Article 81, Section 7(15) of the Maryland Code (1943 Supp.) from the comparatively small property taxes levied generally upon Maryland taxpayers for State purposes only.

In 1947, pursuant to Article 81, Section 96 of the Annotated Code of Maryland (1939 Edition), appellant duly and timely reported to the State Tax Commission of Maryland

(hereinafter referred to as "Commission") that appellant's total gross receipts derived from its railroad business in the State of Maryland during the previous year 1946 amounted to $1,588,774.48, and duly claimed on its reports and in letters to the Commission, citing pertinent authorities, that of these total gross receipts $705,957.21 had been derived by appellant from that class of its business constituting foreign commerce and the importing and exporting process described above, and that the same were constitutionally exempt and immune from taxation and could not be included as the measure of any state franchise or privilege tax sought to be imposed on such activities, and that no such state franchise or privilege tax could validly be imposed on the privilege of engaging in such activities, by reason of the provisions of Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause). (R. pp. 51, 52.)

Notwithstanding said claim, the Commission in December, 1947, imposed upon appellant, under Article 81, Section 95 of the Annotated Code of Maryland (1943 Supp.), a tentative assessment amounting to $1,588,774.48 and computed thereon a tentative franchise or privilege tax for the year 1947 amounting to $39,092.34. In so doing the Commission included in the franchise or privilege tax imposed upon appellant a separable franchise or privilege tax upon its privilege of engaging in foreign commerce and the importing and exporting process and included in the assessment or measure of the total tax appellant's separable gross receipts derived solely from its operations in foreign commerce and the importing and exporting process.

Thereupon appellant duly and timely applied to the Commission for a reduction of said tentative assessment in an amount equal to its gross receipts derived solely from its operations in foreign commerce and the importing and ex-

porting process, again claiming that the tentative assessment, insofar as it included such gross receipts, and that a franchise or privilege tax calculated on an assessment which included such gross receipts, would contravene the said Import-Export Clause of the Constitution of the United States (R. p. 53). This application for exemption of such gross receipts would, if recognized, have reduced the said assessment by $705,957.21, to an assessment of $882,817.27, and the said franchise or privilege tax by $17,648.34 to a tax of $21,444.00.

At a formal hearing on said application before the Commission, appellant duly offered factual evidence supporting its application, including detailed evidence showing that that portion of the franchise or privilege tax for 1947, as calculated by the Commission, imposed upon its privilege to engage in foreign commerce and the importing and exporting process, was over ten times greater in amount than a non-discriminatory ad valorem property tax for state purposes only would be, if the assessed value of appellant's properties utilized in its importing and exporting operations, should be taxed at the same ad valorem rate applicable generally to the property of other taxpayers in the state. Following said hearing the Commission on March 24, 1948, passed an order that appellant's gross receipts tax for the year 1947 as tentatively assessed was "constitutional" and its "protest is disallowed" and entered a final assessment againt appellant amounting to its total gross receipts, or $1,588,774.48, including gross receipts of $705,957.21 derived by appellant solely from its operations in foreign commerce and the importing and exporting process; and the Commission imposed a total franchise or privilege tax for the year 1947 upon appellant amounting to $39,092.34, which included a franchise or privilege tax upon appellant's privi-

lege to engage in foreign commerce and the importing and exporting process amounting to $17,648.34 (R. pp. 53-65).

On April 19, 1948, appellant duly and timely, pursuant to Article 81, Section 194(b) of the Annotated Code of Maryland (1947 Supp.), appealed from said order and final assessment to the Circuit Court No. 2 of Baltimore City, a state equity court of first instance having statutory jurisdiction in the premises to review judicially said assessment and order of the Commission and correct the same for errors of law only. In its petition of appeal to said court and at the trial of the issues of law therein, appellant contended that the assessment appealed from, in so far as it included therein $705,957.21 gross receipts derived by appellant solely from its operations in foreign commerce and the importing and exporting process, and that the franchise or privilege tax amounting to $17,648.34 whiel was imposed upon appellant's privilege to engage in foreign commerce and the importing and exporting process, contravened Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause) (R. pp. 65, 66). Appellant prayed said court to issue a decree holding and declaring that the provisions of Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) were unconstitutional and invalid as applied to appellant's privilege to engage in foreign commerce and the importing and exporting process and to its gross receipts derived solely therefrom.

On June 24, 1949, the Circuit Court No. 2 of Baltimore City (Sherbow, J.), duly filed its written opinion (copy thereof appended hereto), deciding that the said statute, Article 81, Sections 94½ and 95 of the Annotated Code of Maryland (1943 Supp.) was valid and not repugnant to the said Import-Export Clause of the Constitution of the United States, and on June 29, 1949, the said Circuit Court No. 2

of Baltimore City entered its decree "that the decision of the State Tax Commission of Maryland to include in the measurement of the Petitioner's gross receipts tax for the year 1947 receipts derived from the transportation of goods consigned for importation or destined for exportation, be and the same is hereby sustained."

On June 30, 1949, appellant duly and timely, pursuant to Article 81, Section 194(b) of the Annotated Code of Maryland (1947 Supp.) as amended by 1949 Laws of Maryland, Chapter 413, entered an appeal to the Court of Appeals of Maryland, which is the highest court in the state of Maryland in which a decision could be had, from the said decree of the Circuit Court No. 2 of Baltimore City dated June 29, 1949. On such appeal, as stated in Section A of this Jurisdictional Statement, there was drawn in question by the appellant the validity of the statute of the State of Maryland (namely, Annotated Code of Maryland, 1943 Supplement, Article 81, Sections 94½ and 95), as set out in Section B of this Jurisdictional Statement, on the ground of its being repugnant to Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause). The record of the case in the Court of Appeals of Maryland consisted of a Statement of the Case prepared and signed by all the parties to the case with the approval of the lower court, as authorized by Rule 22 of the Court of Appeals of Maryland, showing how the questions in the case arose and were decided below. The decision and final decree in this case entered by the Court of Appeals of Maryland on April 19, 1950 (two judges dissenting), was in favor of the validity of said statute. Copies of the majority opinion of the Court of Appeals of Maryland and the dissenting opinion are appended hereto.

F

Substantiality of Questions Involved

Appellant contends on the following grounds that the questions involved in this appeal are substantial:

1. The Court of Appeals of Maryland, with two judges dissenting, held that a state may validly, notwithstanding Article 1, Section 10, Clause 2 of the Constitution of the United States (Import-Export Clause), lay and impose a franchise or privilege tax upon the privilege of a railroad company to engage in foreign commerce and in the importing and exporting process (by handling, transporting and forwarding, as agent for those owning and controlling the goods, imports and exports), and measure the tax by the gross receipts derived from the exercise of that privilege.

This holding runs directly counter to the following decisions of the Supreme Court of the United States, applying the prohibition of the Import-Export Clause to state taxes on analogous privileges, and to the reasoning and pronouncements of the Supreme Court supporting those decisions:

Richfield Oil Corp. v. *State Board of Equalization*, 329 U. S. 69 (1946), holding invalid as repugnant to the Import-Export Clause, a California franchise or occupation tax on retailers, measured by gross receipts, "for the privilege of selling tangible personal property at retail" as applied to the privilege of selling gasoline while it was an export, and emphasizing the distinction between the unqualified prohibition against "any" such tax contained in the Import-Export Clause and the more limited prohibition against certain state taxes implied in the Commerce Clause.

Cook v. *Pennsylvania*, 97 U. S. 566 (1878), holding invalid as repugnant to the Import-Export Clause and the Commerce Clause a Pennsylvania license or privilege tax upon the privilege of an auctioneer to sell imports at auction, measured by the gross receipts of the auctioneer from such sales.

Crew-Levick Company v. *Pennsylvania*, 245 U. S. 292 (1917).

Joseph v. *Carter & Weekes Stevedoring Co.*, 330 U. S. 422 (1947), holding invalid as repugnant to the Commerce Clause (and *a fortiori* impliedly holding invalid, insofar as foreign commerce was concerned, as repugnant to the Import-Export Clause) a New York tax upon the privilege of engaging in the business of stevedoring imports and exports moving in foreign commerce and also goods moving in interstate commerce, measured by the gross receipts from such business.

Puget Sound Stevedoring Co. v. *Commission*, 302 U. S. 90 (1937), holding invalid as repugnant to the Commerce Clause (and *a fortiori* impliedly holding invalid, insofar as foreign commerce was concerned, as repugnant to the Import-Export Clause) a Washington tax upon the privilege of engaging in certain occupations held to cover the occupation of stevedoring freight moving in interstate and foreign commerce, measured by the gross receipts from such business.

Almy v. *California*, 24 How. (U.S.) 169 (1860), holding invalid as repugnant to the Import-Export Clause a state stamp tax or excise upon the privilege of issuing a bill of lading for articles which were at the time of that decision regarded as exports.

Fairbanks v. *U. S.*, 181 U. S. 283 (1901), holding invalid as repugnant to the Export Clause of the Constitution of the United States (Article I, Section 9, Clause 5) a federal stamp tax or excise upon the privilege of issuing a bill

of lading or entering into a contract of affreightment with a common carrier for carrying exports.

U. S. v. *Hvoslef*, 237 U. S. 1 (1915), holding invalid as repugnant to the Export Clause of the Constitution of the United States (Article 1, Section 9, Clause 5) a federal stamp tax or excise imposed upon the privilege of entering into a charter party for carrying exports.

Thames & Mersey Insurance Co. v. *U. S.*, 237 U. S. 19 (1915), holding invalid as repugnant to the Export Clause of the Constitution of the United States (Article 1, Section 9, Clause 5) a federal stamp tax or excise upon the privilege of entering into a contract of marine insurance insuring a cargo of exports.

2. The fact that the judges of the Court of Appeals of Maryland could, notwithstanding the governing decisions of the Supreme Court cited above and the absence of any decision of the Supreme Court to the contrary, divide upon the question of the validity of such a privilege tax as applied to a railroad's privilege to engage in the importing and exporting process, and the fact that the majority of the Court of Appeals of Maryland could sustain the Maryland statute here assailed, demonstrates the imperative need of an authoritative decision by the Supreme Court of the precise question presented by this appeal, namely, the application of the Import-Export Clause to a state privilege tax upon the precise privilege of a railroad company here involved. The decisions of the Supreme Court interpreting and applying the Import-Export Clause have been relatively few in number and the precise question involved in this appeal has never before been presented to the Supreme Court for decision.

3. The decisions of the Supreme Court cited above, and the fact that the judges of the Court of Appeals of Maryland divided upon the question of the validity of the Mary-

land statute here assailed, demonstrate that those questions involved in this appeal more than meet the test of substantiality announced in *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258 (1934), namely, that only those questions within the jurisdiction of the Supreme Court are not substantial which are "clearly not debatable and utterly lacking in merit". Unlike the state of the settled law regarding the validity of state vaccination statutes present in *Zucht* v. *King*, 260 U. S. 174 (1922), the existing authorities referred to above clearly support, and no decision of the Supreme Court militates against, appellant's contention that the state statute here assailed contravenes the Import-Export Clause.

4. In *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69 (1946), the State of California sought to uphold the state tax there assailed by borrowing, for purposes of interpretation and application of the Import-Export Clause, certain considerations which had been judicially developed in decisions interpreting the Commerce Clause and applying that clause to certain state taxes, and the Supreme Court in that case flatly rejected that technique, because of the differences in wording and meaning between the said two clauses of the Constitution of the United States.

Nevertheless, the Court of Appeals of Maryland in the case at bar expressly held that the Import-Export Clause should not "be given a more prohibitive effect" upon state taxes than the Commerce Clause. It further borrowed the "in lieu tax" principle applied in certain Commerce Clause cases like *U. S. Express Co.* v. *Minnesota*, 223 U. S. 335 (1912), (upholding under the Commerce Clause certain state property taxes imposed upon gross receipts derived from interstate commerce in lieu of non-discriminatory equivalent ad valorem property taxes which might have been imposed upon the property used in interstate com-

merce), to uphold in the case at bar, under the Import-Export clause, a franchise or privilege tax imposed upon the privilege of engaging in the importing and exporting process in lieu of state ad valorem property taxes which, if they had been imposed, would have been less than one-tenth of the amount of the said franchise or privilege tax.

5. This appeal may be decided under the Import-Export Clause alone, but insofar as the Maryland statute here assailed is of questionable validity under the Commerce Clause as well, a resolution by the Supreme Court of that alternative and subordinate question would clearly be timely and of great and important consequence in the interpretation of the Commerce Clause in its application to state privilege taxes. Compare *Freeman* v. *Hewit*, 329 U. S. 249 (1946), and *Interstate Oil Pipeline* v. *Stone*, 337 U. S. 662 (1949).

6. The pecuniary amount of the allegedly invalid tax imposed upon appellant for the year 1947, the taxable year directly involved in this appeal, is $17,648.34 and is substantial. The gross receipts from appellant's operations in the importing and exporting process for the year 1946 claimed to be constitutionally exempt as a measure of the allegedly invalid tax for the year 1947 amounted to over forty-four per cent. of appellant's total gross receipts in that year.

Furthermore, an authoritative decision by the Supreme Court of the questions in this case would determine also as a precedent, the liability or non-liability of appellant for a large amount of such taxes in prior years still open and in later years than the taxable year 1947, and the said liability or non-liability of other railroad companies similarly situated in future years to the State of Maryland and to other states which have imposed similar gross receipts taxes upon

the right of railroads to engage in importation and exportation. It is a subject for judicial notice that railroads are hard-pressed financially, in part by reason of heavy tax burdens, which makes it all the more important and in the public interest that they be relieved of unconstitutional exactions.

G

Cases Sustaining the Jurisdiction

The following cases sustain the jurisdiction of the Supreme Court of the United States of this appeal:

1. Jurisdiction to entertain an appeal from the final decree of a state court where the validity of a state statute was drawn in question as repugnant to the Import-Export Clause of the Constitution of the United States and the decision was in favor of its validity. *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69 (1946), *Cook* v. *Pennsylvania*, 97 U. S. 566 (1878), *Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917), *Almy* v. *California*, 24 How. (U. S.) 169 (1860), *Brown* v. *Maryland*, 12 Wheat. 419 (1827), *Empresa Siderurgica* v. *County of Merced*, 337 U. S. 154 (1949).

2. Jurisdiction to entertain an appeal from the final decree of a state court where the validity of a state statute was drawn in question as repugnant to the Commerce Clause of the Constitution of the United States and the decision was in favor of its validity. *Cook* v. *Pennsylvania*, 97 U. S. 566 (1878), *Crew-Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917), *Brown* v. *Maryland*, 12 Wheat. 419 (1827), *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), *Freeman* v. *Hewit*, 329 U. S. 249 (1946), *Interstate Oil Pipeline Co.* v. *Stone*, 337 U. S. 662 (1949), *Bush Co.* v. *Maloy*, 267 U. S. 317 (1925).

3. Jurisdiction to entertain this appeal on the ground that the questions sought to be reviewed thereby are substantial. The cases cited in paragraphs 1 and 2 supra and also the following cases—*Hamilton* v. *Regents of University of California*, 293 U. S. 245 (1934), *Hunter* v. *City of Pittsburgh*, 207 U. S. 161 (1907), *Missouri ex rel. Wabash Railway Co.* v. *Public Service Commission*, 273 U. S. 126 (1926), *Offield* v. *N. Y., N. H. & H. Rwy. Co.*, 203 U. S. 372 (1906), *Monterey* v. *Jacks*, 203 U. S. 360 (1906), *Mobile Transportation Co.* v. *Mobile*, 187 U. S. 479 (1903).

Therefore, the appellant, Canton Railroad Company, submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of U. S. C. Title 28, Section 1257(2).

Respectfully submitted,

JOHN HENRY LEWIN,
VENABLE, BAETJER & HOWARD,
Attorneys for Canton Railroad Company, Appellant.

APPENDIX "A"

OPINION OF THE CIRCUIT COURT NO. 2 OF BALTIMORE CITY

These appeals by the Western Maryland Railway Company and the Canton Railroad Company are based upon the contention set up by the taxpayers that the gross receipts tax assessed under the provisions of Code, Article 81, Sections 94½ to 99 (1943 Supplement), inclusive, are unconstitutional and invalid as applied to the operating revenues of the railroads derived from their import and export business.

This Code provision requires railroads and certain other public utilities to pay an annual tax "as a franchise tax * * * measured by the gross receipts for the preceding calendar year. * * *" Taxable gross receipts are limited to operating revenues derived from business in this State. The tax has been in effect since 1872, but has never been directly passed upon by the Supreme Court of the United States. Our Court of Appeals has held that this tax does not violate the Commerce Clause of the Federal Constitution. (Railroad vs. State, 92 Md. 668, 1901.)

Now for the first time the question is raised as to whether the Import-Export Clause of the Constitution of the United States prevents the State of Maryland from levying this tax on the gross receipts earned by railroads in this State from the transportation of exported and imported goods.

The amount of taxes involved in this controversy is considerable and will be high as long as export traffic remains at its present level. The methods of calculation are not before the court, although it is apparent the actual determination of export-import traffic is difficult, but not impossible, of ascertainment as the railroads keep complete detailed records of shipments.

The railroads filed their returns to the State Tax Commission in due course, but after several recent decisions of the U. S. Supreme Court they filed amended returns seeking to eliminate the gross receipts earned from the transportation of exported coal, grain and miscellaneous commodities, and of imported ores and other freight. The

claim is based upon the Export-Import Clause, Article I, Section 10, Clause 2, of the Constitution of the United States, the taxpayers asserting this clause prohibited such State taxation.

After lengthy hearings the State Tax Commission held the tax was not prohibited by this constitutional provision and these appeals followed.

The Export-Import Clause of the Constitution, Article I, Section 10, Clause 2, is as follows:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

This section of the Constitution is broad and all inclusive with only one exception not relevant here. It prohibits the State from levying any tax on exports or imports and from deriving any revenue from this source. This clause represented a compromise in the Constitutional Convention between those advocating local and those advocating national sovereignty. Its purpose was to end the strife that had characterized the Confederation. Southern States felt they would bear the brunt of imposts on imports if left to individual States for determination, while exporting States felt they would be at a trading disadvantage if other States taxed their products flowing through these States to foreign markets. By Article I, Section 9, of the Constitution, even Congress was placed under a disability to tax exports for fear of discrimination. Congress was given the power to regulate interstate and foreign commerce, but the power to tax exports was taken from the States to prevent coastal States from taxing goods produced inland and sold abroad. (The Federalist, No. 42; Elliot's Debates, 252, 483; 14 U. of C. Law Review, 672.)

Over the years various cases came to the Supreme Court for determination as to whether the different taxes imposed from time to time violated this provision of the Constitution.

These cases range all the way from taxes on foreign bills of lading to taxes upon baseball equipment for foreign shipment. These cases are collected in various law review articles, where they are summarized, and are not repeated here. (See 14 University of Chicago Law Review, 669; 42 Illinois Law Review, 251; 59 Harvard Law Review, 627; 60 Harvard Law Review, 501 and 710.)

Then came the cases of Richfield Oil Corporation vs. State Board of Equalization (1946), 329 U. S. 69, and a short time later Joseph vs. Carter and Weeks Stevedoring Co. (1947), 330 U. S. 422.

The Richfield Oil case involved the validity of the California Retail Sales Tax as applied to the sale of oil for export. Under the California Law it was the duty of the vendor Richfield Oil, to collect the tax from the vendee. In this instance the purchaser was the New Zealand Government. The oil was carried by pipe line from the refinery to storage tanks at the harbor, and then pumped into the hold of the steamer for shipment abroad.

The Supreme Court held that the Import-Export Clause prohibited the imposition of this State Tax on this sale, with the opinion by Mr. Justice Douglas, six Justices concurring, and Mr. Justice Black dissenting. The opinion discusses the Import-Export Clause at some length and pointed out that "any" tax, whether discriminatory or not, is prohibited by the Export-Import Clause. There are no qualifications, and only one minor exception.

In applying this provision of the Constitution to the facts in that case the Supreme Court found that when the oil was delivered into the hold of the vessel "that delivery marked the commencement of the movement of the oil abroad." The process of exporting within the meaning of the Constitution began when the goods actually started their movement in foreign commerce, and then the immunity attaches.

The Joseph case, supra, involved the validity of the New York City gross receipts tax as applied to gross receipts derived from stevedoring. By a five to four decision the Supreme Court held the tax invalid under the commerce clause, but Mr. Justice Douglas (who wrotes the opinion in the Richfield case) dissented, taking the view that the tax did not violate the commerce clause but did violate the Import-Export Clause. The majority did not base their decision on the Import-Export Clause of the Constitution.

In the case of Joy Oil Co. vs. State Tax Commission, decided June 13, 1949, by the Supreme Court, 17 U. S. Law Week, 4508, Mr. Justice Frankfurter, speaking for the majority of the Court, held that a million and a half gallons of gasoline, marked for export, but held in Michigan for fifteen months awaiting adequate transportation facilities, was subject to an *ad valorem* property tax assessed by the City of Dearborn. The Court said, it was not enough "that by the rail shipment to Detroit one step in the process of exportation had been taken * * *. The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."

While it is true the Supreme Court, in Mr. Justice Douglas' opinion in Empresa Siderurgica, S. A. vs. County of Merced, decided May 31, 1949, 17 U. S. Law Week, 4431, held that "the tax immunity runs to the process of exportation and the transactions and documents embraced in it," it is equally true the Court was again passing on the direct tax on the article itself.

The taxpayers urge that Hooven & Allison vs. Evatt, 324 U. S. 652 (1945) is authority for holding that the importing process continues through the rail journey to an inland destination. The Court there held that the hemp in Ohio, ready for use in manufacture, still in its unbroken package, remained an import after the railroad journey was over. Again the Court was dealing with a tax on the article itself.

It is thus seen that the question presented in the Richfield Oil case, Joy Oil Co. case, the Empresa Siderurgica, case and the Hooven and Allison case, involved a tax on the articles themselves because those articles had obtained or retained the characteristics of exports or imports. But that is not the question in this case. Here the issue is whether the Maryland Gross Receipts Tax, as applied to the railroads involved, is a tax on the activity or process of exporting and importing.

In Crew-Levick Co. vs. Pennsylvania, 245 U. S. 292 (1917), the Supreme Court held invalid a gross receipts tax levied against a taxpayer who was actually selling exports. That case established the rule that a gross receipts tax imposed upon the business of selling goods in foreign commerce was, in effect, "a regulation of foreign commerce of an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution." But the Crew-Levick case did not decide that every non-discriminatory gross receipts tax imposed upon, or which might influence, the export business was invalid, nor did it define, for all purposes, the scope of activities which might be embraced within the concept of the "export business".

It seems obvious that the railroads here involved are not engaged in the exporting or importing business. These carriers do not control the shipments of the products other than to bring them, in certain cases, to the water's edge. Here, unlike the taxpayer in the Crew-Levick case, the railroads are not concerned directly with foreign markets and foreign buyers. While it may be true that the railroads, in part, make possible that other persons may engage in the export-import business, such assistance does not convert the carriers into exporters or importers themselves.

Taking the contention of the railroads in its most favorable light, therefore, it can be seen that they seek to have held invalid the Maryland Gross Receipts Tax because it is imposed not upon the business or process of importing and exporting but upon an activity which merely assists other persons to engage in that business. No Supreme Court case has gone this far, and, in my opinion, the contention is without merit.

The Court holds that the Maryland Gross Receipts Tax is too remote and indirect to be affected by the Export-Import Clause. Goods are in transit on these railroads at all times, but are not in the process of exportation until delivered to the ultimate carrier for shipment abroad. The State tax is not a tax on exports or imports or on the business or process of exporting or importing, but is a tax on the privilege of operating a railroad in the State of Maryland, and is in lieu of certain other taxes. (See State Tax Commission vs. Western Md. Ry., 52 A. 2d, 615.) The tax is not levied on the goods exported or imported, or the proceeds, or the privilege of exporting or importing.

All transportation in some manner affects to some degree exports and imports. The real question is, how much and how direct, and whether there is a close and substantial relationship to exports and imports as to come within the prohibition of the Constitution.

There must at some point be a distinction between the direct and indirect effects of any tax. We must determine what its limit is and what its practical application amounts to.

This clause does not reach all enterprises and transactions which have a remote and indirect effect on exports and imports, otherwise it would embrace every kind of tax. The income tax paid by a railroad in some measure affects exports and imports and is based in some degree on the profits from such traffic. Other taxes paid by railroads of necessity affects exports and imports, but such affect is indirect and remote.

These railroads do not engage in foreign commerce, nor do they control the shipments of the products other than to bring them to other carriers for export or to receive them from other carriers for further transportation inland. To hold that they are engaged in exporting and importing because the merchandise is ultimately actually shipped abroad or received from foreign countries is another way of saying that that which was indirect has become direct.

It appears to me that the Maryland tax is not on the business of importing or exporting and is so remote insofar as its affect on exports and imports or the process of export-

ing or importing as not to be in contravention of the constitutional clause already mentioned.

The decision of the State Tax Commission in each case is sustained.

JOSEPH SHERBOW,
Judge.

Filed: June 24, 1949.

APPENDIX "B"

COURT OF APPEALS OF MARYLAND

No. 76, October Term, 1949—Filed April 19, 1950

(Combined With No. 96)

WESTERN MARYLAND RAILWAY COMPANY

vs.

STATE TAX COMMISSION OF MARYLAND

Argued by W. Harvey Small (Wm. C. Purnell on the brief) for appellant.

Argued by Hall Hammond, Attorney-General, and Harrison L. Winter, Assistant Attorney-General, for appellee.

No. 96, October Term, 1949—Filed April 19, 1950

(Combined With No. 76)

CANTON RAILROAD COMPANY

vs.

JOS. H. A. ROGAN, et al., Etc. Const. the STATE TAX COMMISSION OF MARYLAND

Argued by John Henry Lewin (J. Crossan Cooper, Jr., and Venable, Baetjer & Howard on the brief) for appellant.

Argued by Hall Hammond, Attorney-General, and Harrison L. Winter, Assistant Attorney-General, for appellee.

Two appeals in one record from the Circuit Court No. 2 of Baltimore City. Joseph Sherbow, Judge.

Argued before Marbury, Chief Judge; Delaplaine, Collins, Grason, Henderson and Markell, JJ.

Constitution of United States—Export-Import Clause—Maryland Gross Receipts Tax on Railroads

The railroads contended that the Maryland Gross Receipts Tax was invalid under the export-import clause of the Federal Constitution, as to certain portions of their receipts derived from their services rendered in "the importing and exporting process."

The State contended that the tax based on all gross receipts of the railroads was in lieu of a franchise tax which it could properly levy.

HELD: The tax is not in violation of the export-import clause of the Constitution of the United States.

Affirmed.

COLLINS, *J.*—

These appeals are taken by Western Maryland Railroad Company (Western Maryland) and Canton Railroad Company (Canton), from decrees of Circuit Court No. 2 of Baltimore City sustaining final assessment against the appellants made by the Maryland State Tax Commission (the Commission) for gross receipts taxes imposed by Article 81, Section 95 of the 1943 Supplement of the Code.

In the case of Western Maryland the contested taxes for the years 1946 and 1947 are computed upon its gross receipts within the State of Maryland for the preceding calendar years of 1945 and 1946, respectively. In the case of Canton the contested taxes for the year 1947 were computed upon its "gross receipts for the calendar year 1946" within the State of Maryland. Both appellants claim that certain portions alleged to have been derived from their services rendered in "the importing and exporting process" should not have been included within the total amount of gross receipts subject to the tax. They claim that

Article 1, Section 10, Clause 2, of the Constitution of the United States grants immunity to that portion of the gross receipts.

The pertinent provisions of Article 81, Sections 94½ and 95, 1943 Supplement of the Code follow:

"94½. The phrases 'gross receipts,' 'total receipts,' 'gross earnings,' 'total earnings' and 'all earnings,' as used in Sections 95 to 100, inclusive, mean in the case of railroads and other public service corporations, the operating revenues thereof, without any deductions or credits of any kind whatsoever. When any public service corporation is engaged in more than one class of business and one or more classes thereof is business not subject to the gross receipts tax or subject thereto at different rates, the operating revenues of the class or classes of business subject to such tax at different rates shall be reported separately and taxed at the rate or rates applicable to such class or classes of business. This section shall not be construed as implying that in the absence of this section the requirements of Sections 95 to 100, inclusive, could properly be otherwise construed.

95. (a) A State tax as a franchise tax is hereby levied annually for the year 1930 and subsequent years measured by the gross receipts for the preceding calendar year, of:

(1) All domestic or foreign railroad companies, whose roads are worked by steam, doing business in this State, at the following rates, to wit:

One and one-quarter per centum on the first $1,000 per mile of gross earnings, or on the total earnings if they are less than $1,000 per mile; and

Two per centum on all gross earnings above $1,000 and up to $2,000 per mile; and

Two and one-half per centum on all earnings in excess of $2,000 per mile.

* * * * * * *

(b) If any such railroad company has part of its road in this state and part thereof in another State or States, such company shall return a statement of its gross receipts over its whole line of road, together with a statement of the

whole length of its line and the length of its line in this State, and such company shall pay to the State, at the said rates hereinbefore prescribed upon such proportion of its gross earnings as the length of its line in this State bears to the whole length of its line; and similar statements shall be made by each oil pipe line company, and each sleeping car, parlor car, express or transportation company, telephone or telegraph or cable company, so that the proportion of the said gross earnings of the said companies, respectively, accruing, coming from their business within this State, may be accurately ascertained, or said statement may be made in any other mode satisfactory to and required by the State Tax Commission. The said gross receipts taxes shall be due and payable at the treasury on or before the first day of July in each year.

"(c) Every partnership or individual engaged in any of the above enumerated branches of business in this State shall be subject to the tax imposed by this section and comply with all provisions relating thereto as if such firm or individual were a corporation."

The so-called Import-Export clause of the Constitution of the United States, Article 1, Section 10, Clause 2, follows:

"No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress." See The Federalist, No. 42; 3 Elliot's Debates, 483; 14 U. of Chicago Law Review, 672.

The operating revenues claimed by the appellants to be exempt were received for transportation, switching, storage, crane privileges, wharfage and weighing of coal, grain, ores, and other miscellaneous commodities in transit between foreign ports and points within the United States. Appellant (Canton) claims that the tax in question is an occupation tax exacted for the privilege of engaging in the import-export process and therefore unconstitutional. This

Court in a long line of cases has sustained the statutory declaration, supra, that the tax here in question is a franchise tax in lieu of all other State property taxes.

In the case of State vs. Philadelphia, Wilmington and Baltimore Railroad Company, 45 Md. 361, the Court had before it Chapter 234 of the Acts of 1872 which was the predecessor of the present Gross Receipts Tax. This Court said in that case at page 379 in holding the tax constitutional: "Properly speaking, the tax is not imposed upon the gross receipts; they are referred to not as descriptive of the subject to be taxed, but merely as furnishing the basis of ascertaining the amount of tax to be paid. If then it is not a tax upon property, what is it? We say, it is a tax upon the *franchise* of railroad companies, measured by the extent of their business." At page 381 it was said: "Being of opinion, then, that the tax upon gross receipts of railroad companies, imposed by the Act of 1872, is a tax upon the franchise of such companies, and not upon their property, * * * we come to the question whether the defendant corporation is exempt from the payment of said tax?" State vs. B. & O. R. R. Co., 48 Md. 49 (1878); Cumberland vs. Pennsylvania R. R. Co., 92 Md., 668 (1901); State vs. U. S. F. & G. Co., 93 Md. 314 (1901); State vs. Central Trust Co., 106 Md. 268 (1907); Postal Telegraph Cable Co. vs. Harford County, 131 Md. 96 (1917); Rogan vs. Baltimore & Ohio Railroad Co., 188 Md. 44 (1947); State Tax Commission vs. Western Maryland Railway Co., 188 Md. 240, 246 (1947).

Western Maryland makes no contention that this is not an in lieu franchise tax. Canton to sustain its contention that the tax is an occupation tax and not an in lieu franchise tax cites Section 144 of Article 81 of the Code (1947 Supplement) which imposes a general franchise tax on corporations. Section 144 (b) explicitly says that the tax is imposed "for its franchise to be a corporation." Sections 95, supra, and 144 supra, tax different kinds of franchises. The franchise to operate a railroad is of course, different from the ordinary privileges conferred by a franchise to operate as a corporation.

Canton also contends that the tax here in question is not a franchise tax in lieu of property taxes because it is not pro-

portionate in amount to the property taxes to which it would have been liable. Canton bases this argument on the fact that if the ordinary rate of State taxes is applied to the assessed value of its property for the calendar year 1946 its taxes would have been $3,800.00 while its gross receipt taxes for that period amount to $39,092.00. Appellee points out in its brief that when Chapter 965 of the Acts of 1945, (substantially reenacted, except as to rates, by Chapter 677 of the Acts of 1947 and codified as Sections 7 (15), 25 (h), 94½ and 95 of Article 81, 1947, Supplement of the Code), is taken into consideration Canton's ad valorem property tax for the calendar year of 1946, as taxes on operating property, including land, would have been $40,681.00, an amount of $1,000.00 "more than the amount of gross receipt taxes imposed for the gross receipts derived during that calendar year." Nashville C. & St. L. Ry. vs. Browning, 310 U. S. 362, Ohio River & W. R. Co. vs. Dittey, 232 U. S. 576.

Appellant (Canton) states in its brief: "If it were an original proposition, one might well argue that the phrase 'any Imposts or Duties on Imports or Exports' was intended to mean no more than property taxes on goods while they constitute imports or exports, or, at the most, taxes in the nature of a tariff. The construction which the Supreme Court has placed upon these words through the years is to the contrary."

The in lieu franchise tax on apportioned gross income has been held valid under the Commerce Clause of the Constitution because it is not a direct tax on interstate business, not because the tax does not in the end increase the cost of interstate business. Such taxes are held valid because they are in lieu taxes and substitute for a property tax which is constitutional. Maine vs. Grand Trunk Railroad Co., 142 U. S. 217, (1891); U. S. Express Co. vs. Minnesota, 223 U. S. 335, (1912); Cudahy Packing Co. vs. Minnesota, 246 U. S. 450, (1918); Northwestern Life Insurance Co. vs. Wisconsin, 247 U. S. 132, (1918); Great Northern Railway Co. vs. Minnesota, 278 U. S. 503, (1929); Illinois Central Railway Co. vs. Minnesota, 309 U. S. 157, (1940); State Tax Commission vs. Western Maryland Railway Co., 188 Md. 240, supra.

An ad valorem property tax on tangible and intangible personal property both used in and derived from the process of importing and exporting is valid. W. P. & Cincinnati Transport Co. vs. Wheeling, 99 U. S. 273, (1879). Burke vs. Wells, 208 U. S. 14. If such an ad valorem tax is constitutional it certainly appears that a franchise tax in lieu of such direct ad valorem taxes is not barred by the Import-Export Clause. New York, ex rel. Parke, Davis & Co. vs. Roberts, 171 U. S. 658 (1898). People, ex rel. American Soda Fountain Co. vs. Roberts, 158 N. Y. 168 (1899).

Both Canton and Western Maryland contend that this tax measured by the gross receipts for handling articles previously imported or to be exported and in "the importing and exporting process," is prohibited by the Import-Export Clause. Of course, a direct tax on imports and exports such as a license tax on the occupation of importing, a direct tax on sales of imports and exports, a tax on the actual doing of an import business, a direct tax on objects in process of importing or exporting, are constitutionally invalid under the Import-Export Clause. Brown vs. Maryland, 12 Wheat. 419, (1827); Crew Levick Co. vs. Pennsylvania, 245 U. S. 292; Anglo-Chilean Nitrate Sales Corp. vs. Alabama, 288 U. S. 218; Spalding & Bros. vs. Edwards, 262 U. S. 66; Hooven & Allison Co. vs. Evatt, 324 U. S. 652.

The tax here in question is not a direct tax on imports or exports like that of a State stamp tax upon bills of lading for the export of gold and silver; or a federal stamp tax on an export bill of lading for wheat exported; or an ad valorem tax on warehouse receipts issued on account of whiskey physically in a foreign country; or a federal stamp tax on charter parties exclusively for the carriage of cargoes from State ports to foreign countries; or a tax applied against contracts of marine insurance which were held to be an integral part of exportation. Almy vs. California, 65 U. S. 169, (1861); Fairbanks vs. United States, 181 U. S. 283, (1901); Selliger vs. Kentucky, 213 U. S. 200, (1909); United States vs. Hvoslef, 237 U. S. 1, (1915); Thames & Mersey Insurance Co. vs. United States, 237 U. S. 19, (1915).

In W. P. & Cincinnati Transport Company vs. Wheeling, 98 U. S. 273, 25 L. Ed. 412 (1879), supra, the city of Wheeling imposed a personal property tax upon vessels in the amount of $.50 on each $100 of the assessed value thereof. These vessels were used in the import-export traffic. The tax was attacked. The Supreme Court in holding this tax valid and constitutional said in part: "Power to impose taxes for legitimate purposes resides in the States as well as in the United States; but the States cannot, without the consent of Congress, lay any duty of tonnage, nor can they levy any imports or duties on imports or exports except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are prohibited from exercising any such power. Outside of those prohibitions the power of the States extends to all objects within their sovereign power, except the means and instruments of the Federal Government. State Tonnage Tax Cases, 12 Wall., 204 (79 U. S., XX, 370)." One of the cases relied on by the Court in that opinion was the Maryland case of Howell vs. State, 3 Gill 14.

In New York ex rel. Burke vs. Wells, 208 U. S. 14, 52 L. Ed. 370 (1908), supra, the City of New York assessed for ad valorem personal property taxes, among other things, the cash on hand and notes owned by a foreign corporation doing business in New York State as importers, which were the proceeds of the sale of imported goods in the unbroken original packages. The Supreme Court of the United States held that those items could be taxed under the New York law as capital employed in business within the State without infringing Article I, Section 10, of the Constitution of the United States, although most of the proceeds of such sales were remitted to the home office of the corporation in Ireland.

In New York, ex rel. Parke, Davis & Co. vs. Roberts, 171 U. S. 658, 43 L. Ed. 323 (1896), supra, it was held that a franchise tax on the amount of the capital stock employed within the State by a foreign corporation conducting a strictly private business is not invalid because a part of its business consists of the importation and sale of articles in original packages. It was contended in that case that this

tax was unconstitutional and invalid under the case of Brown vs. Maryland, supra. In reply to that argument the Supreme Court of the United States said: "But that case is inapplicable. *Here no tax is sought to be imposed directly on imported articles or on their sale.* This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested." (Italics supplied here.)

As herein stated the contested taxes here are for the years 1946 and 1947. Evidently the appellants rely largely on decisions of the Supreme Court of the United States since and beginning in 1946. Great reliance is placed by appellants on the case of Richfield Oil Corporation vs. State Board, 329 U. S. 69 (1946). The majority opinion was written by Mr. Justice Douglas with Mr. Justice Black dissenting. In that case by statute California levied a retail sales tax on certain oil "measured by the gross receipts of retail sales and levied on retailers 'For the privilege of selling tangible personal property at retail'." The Richfield Oil Corporation contracted with the government of New Zealand for the sale of oil, f.o.b. Los Angeles. Payment was to be made in London. Delivery was made by Richfield by its own pipe lines from its refinery in California to storage tanks at the Los Angeles harbor and pumped directly from the storage tanks into a vessel owned by the New Zealand government, in the harbor of Los Angeles, and consigned to the Naval Officer-in-Charge at Auckland, New Zealand. No portion of the oil was used or consumed in the United States. The Supreme Court of the United States, reversing the California Supreme Court, held that the oil became an export no later than when it was delivered into the vessel and when the passage of title by delivery of the oil into the vessel took place, the oil had become an export. This sales tax was therefore a direct tax upon an export and violated the Import-Export Clause. This case was

very similar to and naturally followed the decision in Crew Levick Co. vs. Pennsylvania, 245 U. S. 292, supra.

Joseph vs. Carter & Weekes Co., 330 U. S. 422 (1947), involved a New York State occupation tax upon stevedoring measured by gross receipts from servicing ships at the port of New York. The goods moved both in interstate and foreign commerce. The majority of the Supreme Court of the United States held that this tax violated the Commerce Clause of the Constitution but made no reference to the Import-Export Clause which was argued to the Court. The majority opinion was written by Mr. Justice Reed, concurred in by the Chief Justice, and Justices Frankfurter, Jackson, and Burton. Mr. Justice Black dissented totally from the majority opinion. Justices Douglas, Rutledge and Murphy dissented on the proposition that the Commerce Clause was violated. Justices Douglas and Rutledge dissented from the invalidity of the tax under the Commerce Clause but were of opinion that it was invalid under the Import-Export Clause. This dissenting opinion was based upon the cases of Thames and Mersey Ins. Co. vs. United States, 237 U. S. 19, supra; Spalding & Bros. vs. Edwards, 262 U. S. 66, supra; Richfield Oil Corp. vs. State Board, 329 U. S. 69, supra. The tax here before us is certainly not comparable under the Import-Export Clause to the following taxes before the Supreme Court in the last three cases cited: A tax applied against a contract of marine insurance which is an integral part of exportation and so vitally connected therewith that a tax on the insurance policies is essentially a tax upon the export; a tax upon baseballs sold by a manufacturer in New York to a firm in Venezuela, marked for delivery to the purchaser in Venezuela and delivered to the carrier as directed by the purchaser; a sales tax upon oil as in the Richfield Oil case, supra.

Joy Oil Company vs. State Tax Commission 337 U. S. 286, (1949) involved a personal property ad valorem tax. The gasoline on which the tax was levied was transported from Grand Rapids to Detroit, Michigan, for export, where it was placed in storage tanks from which it was to be shipped by water to Canada. On account of the inability of the taxpayer to obtain shipping space, the gasoline, except for

50,000 gallons exported, remained in Detroit for about fifteen months. The majority of the Supreme Court of the United States held that while the gasoline was stored in Detroit it did not constitute an export because it might have been used for domestic purposes. Four Justices dissented on the ground that all of the facts indicated that the gasoline would be exported. The minority opinion therefore was based on the fact that this was a direct tax on an export and therefore a violation of the Import-Export Clause. Another case involving an invalid direct tax on articles in export is Empresa Siderurgica, S. A. vs. County of Merced, 337 U. S. 154, (1949). That case is not in point here.

It is argued that the Import-Export Clause should be given a more prohibitive effect than the Commerce clause because of the fact that the former contains an express tax exemption whereas the latter does not. Neither clause literally supports the interpretations that have been put upon them by unchallenged decisions. The commerce clause has been extended by implication to prohibit state exactions regardless of Federal regulation, and the Import-Export clause has been extended to cover not only exactions upon the goods themselves but on the integral parts of exportation. The solution of the problem as to where the line should be drawn can hardly depend on verbalism. We find no case dealing with the precise question now presented. On principle, we see no reason why a franchise tax measured by gross receipts, including receipts, from foreign commerce, should be valid under one clause and not under the other, particularly where the tax is in lieu of other permitted taxes.

Decrees affirmed, with costs.

DELAPLAINE, J., and MARKELL, J., dissent and MARKELL, J., files dissenting opinion in which he is joined by DELAPLAINE, J.

MARKELL, J. (dissents)—

On a federal question our duty is to follow the Supreme Court, not to try to lead it. In the fourth Texas primary case, Smith vs. Allwright, 324 U. S. 649, 652, the court re-

marked that the district court had denied relief and "the Circuit Court of Appeals quite properly affirmed its action on the authority of Grovey vs. Townsend, 295, U. S. 45 [the third Texas primary case]." The court thereupon overruled Grovey vs. Townsend and reversed the action "quite properly" taken by the lower court. We are not at liberty to guess about personalities, changes in personnel, or possible future changes in decisions, or to take the obscurantist attitude that determination of the present status of the authorities amounts to searching into the inscrutable and that we should therefore sustain the tax and let the Supreme Court strike it down if it will. As we have recently said, through Chief Judge Marbury, "If the Supreme Court did not mean what it said or said more than it should, or what it should not have said, the responsibility is its and not ours." Goetz vs. Smith, — Md. — 62A 2d 602, 604. We may, and should compare opinions of the court with dissenting opinions to determine the line of demarcation between them and the scope of the decisions of the court.

Cases under the Import-Export Clause are few in comparison with the multitude under the Commerce Clause. For the first 150 years of the operation of the Constitution the Import-Export Clause, approximately but to a fluctuating degree, covered in the same way part of the same field as the Commerce Clause. Consequently in a case involving the broader field of the Commerce Clause it was seldom necessary to discuss the Import-Export Clause at all. In Crew Levick Co. vs. Commonwealth of Pennsylvania, 245 U. S. 292, 295, in which the court held invalid a gross receipts tax on the business of selling goods in foreign commerce, it was said, "The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be re-

garded as interchangeable terms." For the last ten years the field covered by the Import-Export Clause has, to an important extent, included taxes not prohibited by the Commerce Clause. This important difference between the coverage of the two clauses is not due to changes in decisions under the Import-Export Clauses, with which we are here concerned, but to changes in decisions under the Commerce Clause with which fortunately we are not concerned. With one exception (which will now be mentioned but is not now material) there has been from the first no change in the decisions under the Import-Export Clause. In Brown vs. Maryland, 12 Wheat. 419, 449, (1827), it was "supposed" and in Almy vs. California, 24 How. 169, (1861), it was assumed, as the basis of an unanimous opinion, that the Import-Export Clause is applicable to "imports" and "exports" from one state into another. In Woodruff vs. Parham, 8 Wall. 123, (1869), these dicta were discarded and the clause held applicable only to imports from and exports to a foreign country.

On their face the Import-Export Clause and the Commerce Clause suggest two possible differences, (1) the Commerce Clause covers "commerce," the Import-Export Clause "imports" and "exports", which conceivably might be construed as meaning only the goods imported or exported, not the business or process of importation or exportation, (2) the Commerce Clause does not contain any express tax exemption, the Import-Export Clause does. In Brown vs. Maryland, supra, the first case under the Import-Export Clause, the first possible difference was negatived. That clause ever since has been construed as exempting from taxation not only the goods imported or exported, but the business and the process of importation or exportation. The second possible difference was never completely excluded, for about 150 years in a varying degree was almost eliminated, but in the last ten years has been definitely affirmed.

Until 1869 the Import-Export Clause was assumed to give an express tax exemption to transportation in foreign or interstate commerce. In 1873 there were decided State Freight Tax, 15 Wall. 232, and the State Tax on Railway

Gross Receipts, 15 Wall. 284, the former holding invalid a tax on freight, including interstate freight, at graduated rates per ton on different articles, the second sustaining, a Pennsylvania tax on railway gross receipts, including receipts from interstate commerce. The opinions in both cases were delivered by the same justice, but only four justices concurred in both decisions, which were essentially irreconcilable. After repeated subsequent decisions consistent with the State Freight Tax, the State Tax on Railway Gross Receipts was in effect overruled in Philadelphia and Southern Steamship Co. vs. Pennsylvania, 122 U. S. 326, (1887).

Thereafter until about ten years ago it was held that interstate commerce, and specifically gross receipts from such commerce, were exempt from state taxation, with one important but elusive exception, viz., a gross receipts tax, by whatever name called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor is not unconstitutional. Maine vs. Grand Trunk Railroad Co., 142 U. S. 217 (1891), as explained in Postal Cable Co. vs. Adams, 155 U. S. 688 (1895), and Galveston, Harrisburg and San Antonio Railway Co. vs. Texas, 210 U. S. 217, 227 (1908). Such a permitted tax has been called a commutation tax (210 U. S. 226) and, by counsel in the instant case, an "in lieu" tax. For about ten years, beginning with McGoldrick vs. Berwind-White Coal Mining Co., 309 U. S. 33 (1940), the court has narrowed the effect of the Commerce Clause as prohibiting taxes which burden interstate commerce. The court still holds that, "From the Commerce Clause itself, there comes * * * an abridgment of the state's power to tax within its territorial limits. This has arisen from long-continued judicial interpretation that without congressional action the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce [4] and that this rule applies in full force to an unapportioned [5] tax on the gross receipts from interstate business,[6] where the taxes were not in lieu of *ad valorem* taxes on property [7] [Citing cases in footnotes 4, 5, 6 and 7.]" Joseph vs. Carter & Weakes Co., 330 U. S. 422, 427. In the case just quoted a state tax on the gross

receipts of a stevedoring corporation from work on ships engaged in interstate and foreign commerce was held unconstitutional under the Commerce Clause. The statement quoted is appreciably narrower than it might have been before the Berwind-White case.

In Richfield Oil Corporation vs. State Board of Equalization, 329 U. S. 68, decided a few months before the *Joseph* case, the court indicated the change that had occurred in the recent Commerce Clause cases, and, what is more important and, I think, decisive in the instant case, the difference in this respect between the Commerce Clause and the Import-Export Clause. "* * * the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the States, even in absence of action by Congress. [Citing cases]. But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in McGoldrick vs. Berwind-White Coal Mining Co., supra, p. 48, the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits (see *e. g.* Western Live Stock vs. Bureau of Revenue, 303 U. S. 250, 254-255, and cases cited; McGoldrick vs. Berwind-White Coal Mining Co., supra) and by invalidating those which discriminate against interstate commerce, which impose a levy for the privilege of doing it, which place an undue burden on it. [Citing cases]." After thus describing the somewhat tenuous line between taxes which are prohibited and those which are permitted under the Commerce Clause, the court then makes plain that there is no exception at all from the unqualified tax exemption under the Import-Export Clause.

"It seems clear that we cannot write any such qualification in to the Import-Export Clause. It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection Laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax. As we shall see, the question as to what is exportation is somewhat entwined with the question as to what is interstate commerce. But the two clauses, though complementary, serve different ends. And the limitations of one cannot be read into the other." 329 U. S. 75-76.

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"We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification." 329 U. S. 78. In the *Richfield* case the court held unconstitutional under the Import-Export Clause application of a California gross receipts sales tax to an export shipment.

As a decision under the Import-Export Clause the *Richfield* case is not qualified, but reaffirmed, by the *Joseph* case. In the *Joseph* case, five justices broadened the invalidation of the tax to include interstate commerce as well as imports and exports, seven condemned it as to imports and exports. It is impossible to escape Professor Powell's interpretation of the opinions in this respect. 60 Harvard Law Review 744. Though the majority opinion does not mention the Import-Export Clause it cites the *Crew Levick* case to the very page quoted, *supra*, where the court said the two questions were one. Reason and authority may be surveyed in vain without finding any ground for holding that a tax, invalid under the Commerce Clause, could be valid, as to imports or exports, under the Import-Export Clause.

A tax on gross receipts from carriage of goods is manifestly a tax on exportation. Transportation is not an incident, direct or indirect, of commerce or exportation. It *is* commerce and exportation. The Export Clause (as far as

it goes) is identical in scope with the Import-Export Clause. In Thames & Mersey Ins. Co. vs. United States, 237 U. S. 19, a stamp tax on marine insurance policies on exports was held unconstitutional. The court said, "The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process." 237 U. S. 27. The major premise, that a tax on freight is a tax on exports, was taken as axiomatic.

Under the Commerce Clause, since the recent cases and perhaps before, it may be that the Maryland gross receipts tax is constitutional as an "in lieu" tax. Canton, but not Western Maryland, disputes this proposition on the facts, but the fact question, I think, is not adequately presented on the record. So far as imports and exports are concerned, the question as to the Commerce Clause is immaterial. In the Import-Export Clause "the prohibition against 'any' tax on imports and exports contains no implied qualification." It matters not, therefore, what is the present scope or extent of the "in lieu" qualification or exception to the cases condemning gross receipts taxes under the Commerce Clause. Before the instant cases no question as to the constitutionality of the gross receipts tax under the Import-Export Clause has ever been raised.

I think the tax, as to imports and exports, is unconstitutional and the judgment should be reversed.

Judge Delaplaine authorizes me to say that he concurs in this opinion.